

ASSEMBLY BILL

No. 2469

Introduced by Assembly Member Bill Berryhill

February 19, 2010

An act to add Chapter 9 (commencing with Section 39950) to Part 2 of Division 26 of the Health and Safety Code, relating to air pollution.

LEGISLATIVE COUNSEL'S DIGEST

AB 2469, as introduced, Bill Berryhill. State Air Resources Board: dispute resolutions.

Existing law authorizes the State Air Resources Board to regulate pollution from primarily vehicular sources, and designates the state board as the state agency charged with monitoring and regulating sources of emissions of greenhouse gases.

This bill would allow a person to seek relief regarding that person's ability to comply with any requirement imposed or administered by the state board, by applying for a dispute resolution order from a hearing officer, pursuant to specified requirements.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Chapter 9 (commencing with Section 39950) is
2 added to Part 2 of Division 26 of the Health and Safety Code, to
3 read:

CHAPTER 9. DISPUTE RESOLUTION ORDERS

39950. (a) Any person may apply to the executive officer of the state board for a dispute resolution order regarding that person's ability to comply with any requirement of Division 25.5 (commencing with Section 38500), any requirement of this division administered by the state board, or of any rule, regulation, or order of the state board.

(b) A dispute resolution order granted by a hearing officer pursuant to this chapter may provide any relief deemed appropriate by the hearing officer after a hearing conducted in accordance with this chapter, including, but not limited to, any of the following:

(1) Modification of a greenhouse gas emissions limit or related requirements, as established pursuant to Division 25.5 (commencing with Section 38500).

(2) Adjustment of greenhouse gas emission allowance allocations under Division 25.5 (commencing with Section 38500).

(3) Extension or adjustment of performance or delivery deadlines.

(4) Temporary or permanent revision to the terms or conditions of an operating permit imposed pursuant to Division 25.5 (commencing with Section 38500).

(5) Issuance of advisory or declaratory opinions regarding agency authority where multiple agencies exercise potentially conflicting jurisdiction.

(6) Making findings or declarations regarding actions that may be desirable or necessary by other agencies or departments.

(c) The hearing officer shall hold a hearing pursuant to this chapter to determine under what conditions, and to what extent, a dispute resolution order shall be granted. No dispute resolution order may be issued, modified, or revoked by a hearing officer, unless a public hearing has been held by the hearing officer pursuant to this chapter.

39951. (a) Any person who is, or will be, out of compliance with any requirement of Division 25.5 (commencing with Section 38500), any requirement of this division administered by the state board, or of any rule, regulation or order of the state board, who has submitted an application for a dispute resolution order and who desires to commence or continue operation pending the

1 decision of the hearing officer on the application, may submit an
2 application for an interim dispute resolution order.

3 (b) An interim dispute resolution order may be granted for good
4 cause stated in the dispute resolution order. The interim dispute
5 resolution order shall not be valid beyond the date of decision of
6 the hearing officer on the application of the dispute resolution
7 order, or for more than 90 days from date of issuance of the interim
8 dispute resolution order, whichever occurs first.

9 (c) The hearing officer shall not grant an interim dispute
10 resolution order after the hearing officer has held a hearing in
11 compliance with the requirements of this chapter, or when such
12 an order is being sought to avoid the notice requirements of Section
13 39962.

14 39952. If a person granted a dispute resolution order with a
15 schedule of increments of progress files an application for
16 modification of the schedule and is unable to notify the hearing
17 officer sufficiently in advance to allow the hearing officer to
18 schedule a public hearing on the application, the hearing officer
19 shall not grant more than one interim authorization, valid for 30
20 days or less, to that person to continue operation pending the
21 decision of the hearing officer on the application. The interim
22 authorization shall not be granted for a requested extension of a
23 final compliance date or when the original dispute resolution order
24 expressly required advance application for the modification of an
25 increment of progress.

26 39953. (a) A dispute resolution order shall not be granted
27 unless the hearing officer makes all of the following findings:

28 (1) The petitioner for a dispute resolution order is, or will be,
29 in violation of any requirement of Division 25.5 (commencing
30 with Section 38500), any requirement of this division administered
31 by the state board, or of any rule, regulation, or order of the state
32 board.

33 (2) Due to conditions beyond the reasonable control of the
34 petitioner, requiring compliance would result in either an arbitrary
35 or unreasonable taking of property, or the practical closing and
36 elimination of a lawful business. When the petitioner is a public
37 agency, the hearing officer shall consider whether or not requiring
38 immediate compliance would impose an unreasonable burden upon
39 an essential public service.

1 (3) The closing or taking would be without a corresponding
2 benefit in reducing air pollution.

3 (4) The applicant for the dispute resolution order has given
4 consideration to curtailing operations of the source of the emissions
5 in lieu of obtaining a dispute resolution order.

6 (5) During the period the dispute resolution order is in effect,
7 that the applicant will reduce excess emissions to the maximum
8 extent feasible or will take all reasonably available actions to
9 achieve the pertinent regulatory objective.

10 (6) During the period the dispute resolution order is in effect,
11 that the applicant will monitor or otherwise quantify emission
12 levels from the source, if requested to do so by the state board,
13 and report these emission levels to the state board pursuant to a
14 schedule established by the state board.

15 (b) As used in this section, the following terms have the
16 following meanings:

17 (1) "Essential public service" means a prison, detention facility,
18 police or firefighting facility, school, health care facility, landfill
19 gas control or processing facility, sewage treatment works, or water
20 delivery operation, if owned and operated by a public agency.

21 (2) "Public agency" means any state agency, board, or
22 commission, any county, city and county, city, regional agency,
23 public district, or other political subdivision of the state.

24 39954. The hearing officer, in determining whether or not the
25 petitioner has presented evidence sufficient to make the finding
26 specified in paragraph (2) of subdivision (a) of Section 39953 shall
27 consider, in addition to any other relevant factors, both of the
28 following:

29 (a) In determining whether or not conditions exist that are
30 beyond the reasonable control of the petitioner, the hearing officer
31 shall consider the extent to which the petitioner took actions to
32 comply or seek a dispute resolution order, which were timely and
33 reasonable under the circumstances. In so doing, the hearing officer
34 shall consider actions taken by the petitioner since the adoption
35 of the rule, regulation, or order from which the dispute resolution
36 order is sought.

37 (b) In determining whether or not requiring compliance would
38 result in either an arbitrary or unreasonable taking of property or
39 the practical closing and elimination of a lawful business, the
40 hearing officer shall consider whether or not an unreasonable

1 burden would be imposed upon the petitioner if immediate
2 compliance is required.

3 39955. Upon making the specific findings set forth in Section
4 39953, the hearing officer shall prescribe requirements no more
5 onerous than those imposed by statute or by any rule, regulation,
6 or order of the state board, that would be applicable to plants and
7 equipment operated by specified industry or business or for
8 specified activity, or to the operations of individual persons. In
9 prescribing other and different requirements, in accordance with
10 this section, the hearing officer, insofar as is consistent with the
11 Legislature's declarations in Sections 39000 and 39001, shall
12 exercise a wide discretion in weighing the equities involved and
13 the advantages to the residents of the state from the reduction of
14 air contaminants and the disadvantages to any otherwise lawful
15 business, occupation, or activity involved, resulting from requiring
16 compliance with these requirements.

17 39956. (a) The hearing officer may require, as a condition of
18 granting a dispute resolution order, that a bond be posted by the
19 party to whom the dispute resolution order was granted to ensure
20 performance of any construction, alteration, repair, or other work
21 required by the terms and conditions of the dispute resolution
22 order. The bond may provide that, if the party granted the dispute
23 resolution order fails to perform the work by the agreed date, the
24 bond shall be forfeited to the state board, or the sureties shall have
25 the option of promptly remedying the dispute resolution order
26 default or paying to the state board an amount, up to the amount
27 specified in the bond, that is necessary to accomplish the work
28 specified as a condition of the dispute resolution order.

29 (b) This section does not apply to vessels so long as the vessels
30 are not operating in violation of any federal law enacted for the
31 purpose of controlling emissions from combustion of vessel fuels.

32 39957. After notice and a hearing, the hearing officer may
33 modify or revoke, by written order, any dispute resolution order.
34 After notice and a hearing, the hearing officer may review and for
35 good cause, including a change in the availability of materials,
36 equipment, or adequate technology, modify a schedule of
37 increments of progress or a final compliance date in that schedule.

38 39958. (a) The hearing officer, in making any dispute
39 resolution order, shall specify the time during which the order shall

1 be effective, which shall not exceed one year, except as otherwise
2 provided in subdivision (b), and shall set a final compliance date.

3 (b) A dispute resolution order may be issued for a period
4 exceeding one year if the dispute resolution order includes a
5 schedule of increments of progress specifying a final compliance
6 date by which the emissions of air contaminants of a source for
7 which the dispute resolution order is granted will be brought into
8 compliance with applicable emission standards.

9 39959. (a) The state board may modify or revoke any dispute
10 resolution order granted by any hearing officer if, in its judgment,
11 the dispute resolution order does not require compliance with a
12 schedule of increments of progress or emission standards as
13 expeditiously as practicable, or the dispute resolution order does
14 not meet the requirements of this chapter.

15 (b) Prior to revoking or modifying a dispute resolution order
16 pursuant to this section, the state board shall conduct a hearing.
17 The person to whom the dispute resolution order was granted shall
18 be given immediate notice of the hearing, and shall be afforded
19 an opportunity to appear at the hearing, to call and examine
20 witnesses, and to otherwise partake as if he were a party to the
21 hearing.

22 39960. The state board may adopt rules for the conduct of
23 hearings pursuant to this chapter. The rules shall be consistent with
24 this chapter and, so far as practicable, shall conform to the rules
25 for administrative adjudications by state agencies in Chapter 5
26 (commencing with Section 11500) of Part 1 of Division 3 of Title
27 2 of the Government Code.

28 39961. For any hearing conducted under this chapter, the
29 hearing officer shall be an administrative law judge from the Office
30 of Administrative Hearings. An officer or employee of the state
31 board shall not serve as a hearing officer for any hearing conducted
32 pursuant to this chapter.

33 39962. (a) In case of a hearing to consider an application for
34 an interim dispute resolution order, the hearing officer shall serve
35 reasonable notice of the time and place of the hearing upon the
36 executive officer of the state board and upon the applicant.

37 (b) In case of a hearing to consider an application for a
38 modification of a final compliance date in a dispute resolution
39 order previously granted, the hearing officer shall serve notice of
40 the time and place of a hearing upon the executive officer of the

1 state board, and upon the applicant, not less than 10 days prior to
2 the hearing. The hearing officer shall also send notice of the hearing
3 to every person who requests notice, and shall obtain publication
4 of the notice in at least one daily newspaper of general circulation
5 within the state. The notice shall state the time and place of the
6 hearing and other information as may be necessary to reasonably
7 apprise the people of the state of the nature and purpose of the
8 meeting.

9 (c) In case of a hearing to consider an application for a dispute
10 resolution order other than those described in subdivision (a) or
11 (b), the hearing officer shall serve notice of the time and place of
12 a hearing upon the executive officer of the state board and upon
13 the applicant, not less than 30 days prior to the hearing. The hearing
14 officer shall also publish a notice of the hearing in at least one
15 daily newspaper of general circulation in the state, and shall send
16 the notice to every person who requests the notice, not less than
17 30 days prior to the hearing. The notice shall state the time and
18 place of the hearing, the place where the application, including
19 any proposed conditions or schedule of increments of progress, is
20 available for public inspection, and any other information that may
21 be necessary to reasonably apprise the people within the state of
22 the nature and purpose of the meeting.

23 (d) A hearing officer shall serve notice pursuant to subdivision
24 (a), (b), or (c) either by personal service or by first-class mail,
25 postage prepaid. If either the identity or address of any person
26 entitled to notice is unknown, the hearing officer shall serve that
27 person by publication of notice in the state pursuant to Section
28 6060 of the Government Code.

29 39963. (a) Any hearing conducted by a hearing officer shall
30 be held in a location readily accessible to the public.

31 (b) The hearing officer shall allow interested members of the
32 public a reasonable opportunity to testify with regard to the matters
33 under consideration, and shall consider that testimony in making
34 his or her decision.

35 (c) The hearing officer shall prepare a record of the witnesses
36 and the testimony of each witness at the hearing. The record may
37 be an audio recording. The record shall be retained by the hearing
38 officer while the dispute resolution order is in effect, or for the
39 period of one year, whichever is longer.

1 39964. (a) The hearing officer may administer oaths in any
2 hearing in which the officer participates. At any hearing, the
3 hearing officer shall require any witness to be sworn before
4 testifying.

5 (b) Whenever the hearing officer conducting any hearing deems
6 it necessary to examine any person as a witness at the hearing, the
7 hearing officer shall issue a subpoena, in proper form, commanding
8 that person to appear before it, at a time and place specified, to be
9 examined as a witness. The subpoena may require the person to
10 produce all books, papers, and documents in his or her possession,
11 or under his or her control, material to the hearing. A subpoena to
12 appear before a hearing officer shall be served in the same manner
13 as a subpoena in a civil action.

14 (c) Whenever any person duly subpoenaed to appear and give
15 evidence, or to produce any books and papers, before a hearing
16 officer commits the acts described in Section 11455.10 of the
17 Government Code, that person shall be deemed in contempt of
18 court, and the hearing officer shall report the fact to the superior
19 court of the county in which the hearing is held. Upon receipt of
20 that report, the superior court shall proceed as specified in Section
21 11455.20 of the Government Code. On the return of the attachment
22 and the production of the body of the defendant, the superior court
23 has jurisdiction of the matter. The person charged may purge
24 himself or herself of the contempt in the same way, and the same
25 proceeding shall be had, and the same penalties may be imposed,
26 as in the case of a witness subpoenaed to appear and give evidence
27 on the trial of a civil cause before a superior court.

28 39965. (a) A hearing officer shall announce his or her decision
29 in writing. The decision of a hearing officer shall include the
30 reasons for the decision. Copies of the decision shall immediately
31 be filed with the clerk of the state board and mailed to all of the
32 affected parties or their attorneys. The decision shall become
33 effective upon filing, unless the hearing officer orders otherwise.

34 (b) A hearing officer, in his or her discretion, within 30 days of
35 the effective date of the decision, may order the rehearing of any
36 matter if a person petitions for a rehearing within 10 days after a
37 copy of the decision has been mailed.

38 39966. (a) Judicial review may be made of a decision of a
39 hearing officer by filing a petition for a writ of mandate in
40 accordance with Section 1094.5 of the Code of Civil Procedure.

1 Except as otherwise provided in this section, the petition for a writ
2 of mandate shall be filed within 30 days after the decision has been
3 mailed pursuant to Section 39965. The right to petition for a writ
4 of mandate shall not be affected by the failure to seek a rehearing
5 before the hearing officer.

6 (b) (1) The complete record of the proceedings, or parts thereof
7 as are designated by the petitioner for a writ of mandate, shall be
8 prepared by the hearing officer and shall be delivered to the
9 petitioner within 30 days after a request, upon payment of the fee
10 specified in Section 69950 of the Government Code for the
11 transcript, the cost of preparation of other portions of the record,
12 and for certification thereof.

13 (2) The complete record includes the pleadings, all notices and
14 orders issued by the hearing officer, any proposed decision by the
15 hearing officer, the final decision, a transcript of all proceedings,
16 the exhibits admitted or rejected, the written evidence, and any
17 other papers in the case.

18 (3) If the petitioner for a writ of mandate, within 20 days after
19 the decision has been mailed, requests the hearing officer to prepare
20 all or any part of the record, the time within which a petition for
21 a writ of mandate may be filed shall be extended until 35 days
22 after the decision has been mailed. The hearing officer may file
23 with the court the original of any document in the record in lieu
24 of a copy.

25 (c) In any proceeding pursuant to this section, the court shall
26 receive in evidence any order, rule, or regulation of the state board,
27 any transcript of the proceedings before the hearing officer, and
28 further evidence as the court, in its discretion, deems proper.